

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

APR 3 - 1934

Henry W. Hodges

CLERK

IN THE

Court of Appeals, District of Columbia

APRIL TERM, 1934.

—
No. 6070.
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449

ELEANOR M. MORGAN, *Appellant*,

vs.

ROBERT J. HOAGE, Deputy Commissioner United States
Employees Compensation Commission, and Stand-
ard Accident Insurance Co., a Corporation.

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BRIEF FOR APPELLANT.
—

~~H. M. WELCH,~~
~~JOHN R. DAILY,~~
J. HARRY WELCH,
FRANK PALEY.

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ard Accident Insurance Co., a Corporation.

BRIEF ON BEHALF OF APPELLANT.

STATEMENT OF FACTS.

The parties hereto will be referred to for convenience sake as plaintiff (Appellant here) and defendant (Appellee here).

The plaintiff, Eleanor M. Morgan, respectfully shows unto this Honorable Court as follows:

(1). That the plaintiff is a citizen of the United States and a resident of the District of Columbia, and

brings this appeal as the surviving widow of James Frederick Morgan, deceased, and on behalf of her minor child by said deceased husband as hereinafter more fully appears.

(2). That the defendant Robert J. Hoage, is a citizen of the United States, a resident of the District of Columbia, and is Deputy United States Employees Compensation Commissioner for the District of Columbia, and is sued in that capacity.

(3). The defendant, Standard Accident Insurance Co., a Corporation is a Corporation duly licensed to do business and is doing business in the District of Columbia and is sued in its own right.

(4). That the plaintiff was legally married to the deceased in September, 1904, and was continuously his wife until the death of the deceased on October 4, 1932; that by their marriage, one child Eleanor F. Morgan was born January 6, 1917, who was at the date of death of deceased and still is a minor.

(5). That heretofore in 1924 the deceased, James Frederick Morgan, was first employed as an officer by the Columbia Lodge of the International Association of Machinists No. 174, and was continuously so employed by it to the time of his death on or about October 4, 1932; that said Lodge is located in the District of Columbia.

(6). That, as plaintiff is informed and believes, during the time of the employment of the deceased as aforesaid, said Columbia Lodge No. 174, of the International Association Machinists, had complied with the provisions of an Act of Congress, approved March 4, 1927, 44 Statute 1424, 33 U. S. C. A., sec. 901, *et seq.*, made applicable to the District of Columbia by act of

May 17th, 1928, 45 Stat. 600 (Tit. 19, secs. 11 and 12, D. C., Code 1929, 33 U. S. C. A., sec. 901 note).

(7). That while so employed by the said Columbia Lodge and while engaged in the course of his employment as Secretary of said Lodge, as plaintiff is informed and believes, said deceased died on or about the fourth day of October, 1932, as hereinafter more fully shown; that thereafter within the time fixed by the said Act the plaintiff applied to the said defendant who duly filed a claim with him for compensation for herself and said minor child, arising out of the death of her said deceased husband; that after due proceedings were had said cause came on for hearing before said defendant, on December 21, 1932, and at said hearing testimony was adduced showing substantially the following facts:

That sometime after 6:30 on the evening of September 29, 1932, in the front of the home of the deceased 3629 Jocelyn St., N. W., the deceased was attacked by one, Harrison Keiser, and shot and died on October 4, 1932, as the result of the gun shot wound (this is not disputed); that the deceased was employed as financial secretary of the said Lodge and amongst his duties was that of interviewing members of the Lodge, prospective applicants for reinstatement and the collection of dues from members and prospective applicants for membership; that part of the records of the Lodge were kept at the home of the deceased at the above address; that his duties involved the collection of dues at any place that he could locate the members of the Lodge and that frequently collections were made at home.

That at a previous date, the deceased had had words with the said Harrison Keiser over the return of a five

dollar payment for reinstatement (this is also admitted) and that as a result of the argument an ill feeling developed by the Assailant against the deceased; that the Commissioner found that the death arose out of the employment.

(8). The above testimony was transcribed, together, with other testimony, in the case and is to be found in the transcript of record filed herein.

ARGUMENT.

For the purpose of convenience and in an endeavor to conserve the time of the Court and in the interest of brevity it may be stated that the questions involved and assigned as error may be succinctly stated, thus:

That the finding of the Deputy Commissioner approved by the lower Court that the injury and death *did not arise in the course of his (deceased's) employment*, and that the failure of the Deputy Commissioner to apply Section 20, of the Longshoreman's and Harbor Workers Compensation Act, were in error.

With respect to the application of Section 20 of the Act referred to it seems obvious that full force and effect should be given thereto in view of the wording of such section which is as follows:

(Section 20) (a):

“In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this Act.”

Certainly there can be no contention that substantial evidence was presented indicating that this claim

did not come within the provisions of the Act and strength is added to our position in this matter by virtue of the fact that the Deputy Commissioner in his findings held that the injury *arose out of the employment* and this finding alone, there being no substantial evidence to the contrary, would appear to be amply sufficient in holding that the claim did come within the provisions of section 20 sub-section (a) as quoted above.

This is not the usual type of case and the very nature of the employment gives rise to duties and services to be performed by the employee at times and places other than at the Lodge Hall or Lodge office; the usual activities of such employees (financial secretary) are so well known particularly the personal contact required of such officers with the membership of the Lodge, that it must be conceded that in the usual course of his official business and duties the financial secretary could not undertake to perform such duties in one place, namely, an office or Lodge Hall; neither can it be properly said that the Secretary under such circumstances would not be in the course of his duties when leaving his home where part of his duties are conceded to have been performed to go to call upon a Lodge member or to the Lodge Hall or office for the continuation of the particular work upon which he was engaged.

Having these things in mind and remembering particularly that this injury arose from the malice of a fellow lodge member who had been in an argument with the deceased, such argument growing out of the lodge work incidental to the duties of the financial secretary, the aggressor being familiar with the duties of the secretary and his habits in performing such

duties, particularly his going to and coming from the said duties; it was clearly shown in this case that the aggressor deliberately planned the assault not at the Lodge Hall, the Navy Yard, or in a public lighted and crowded place, but he surreptitiously secreted himself in a dark, residential street in a quiet part of the City and laid in wait for the deceased knowing that the deceased in keeping with his duties as such Lodge Secretary would leave his home to go about his duties of interviewing Lodge members and calling at the Lodge office in the furtherance of his work.

This immediately suggests the question of time and place of the happening and in this connection reference is made to the case of *Field vs. Charmette Knitting Co.*, 245 N. Y., 139, 156 N. E., 642, where the facts were as follows:

The Superintendent of a Mill had discharged an employee and finding the discharged employee in the building after the closing hour, had ordered him to leave the premises, whereupon, angry words followed and a few minutes later when the Superintendent left the building, the employee was waiting for him on the sidewalk a short distance from the door. The discharged employee challenged him to fight and upon the Superintendent's trying to walk away he was struck in the face by the discharged employee, which striking caused him to fall backward fracturing his skull, from which he died.

Speaking for the Court Mr. Chief Justice Cordoza in the Appellate Court of New York, stated:

“The argument is made however that the injury did not arise in the course of employment for the reason that (Field) the decedent after

finishing his work of the day had left the premises or plant and was out upon the public sidewalk.

“If he had been struck within the threshold liability would be conceded. Because he was struck without, liability has failed.

“We think the line of division is drawn too narrowly and closely when circumstances of place are thus considered to the exclusion of all others. The quarrel outside of the mill was merely a continuation or extension of the quarrel begun within.”

In the case at Bar the argument and quarrel was precipitated at the Navy Yard proper and the chain of events that followed were the ultimate result of the original quarrel. The Deputy Commissioner found that the quarreling arose out of the employment. This being so it is exceedingly difficult to understand why and how and upon what general premise he could arrive at a decision that the injury did not arise in the course of the employment, in view of the facts as shown by the record and having in mind the decision above referred to of Mr. Chief Justice Cordoza. We respectfully submit that that decision certainly would make a case like the one at Bar the exception to the Industrial Premise Rule.

In the matter of Derrer vs. School Board, 9 Order of Industrial Commission of Virginia Reports, 859, is reported a case where a school teacher was assaulted at night by the irate parent of a pupil who had been punished by the teacher. Here the case of Field vs. Charmette Knitting Co., *supra*, was cited and quoted with approval and we submit that certainly where an irate parent visits the home of a school teacher at night long after the closing hour of school and attempts to assault the teacher, thereby injuring her because of a

petty grievance which he holds by virtue of her having chastised his child during school hours, is going much further to prevent an injustice than we here are asking the Court to do when the very nature of the duties of the employee called for his being where he was at the time of the assault in question.

A careful search has been made for cases directly in point with the case at bar and the two referred to are the only ones that have come to light which we have found to be directly in point.

However, it is well settled that when a quarrel grows out of work resulting in assault by one employee upon another that the injury arises out of and in the course of employment. *Warfel vs. Farmers Manufacturing Co.*, 144 Va. 98, 131 S. E., 240 *Holliday vs. Merchants & Miners Transportation Co. (Ga.)*, 124 S. E. 89, *Furst etc. Co. vs. Mayo (Ind.)*, 144, N. E., 857; *Franklin Coal Co. vs. Indiana Commission (Ill.)*, 152 N. E. 498.

It is respectfully submitted that the quarrel out of which this assault arose, having been found by the Commissioner to have arisen out of the employment, that it cannot be properly contended that the assault which then resulted was any less in the course of the employment because of the fact that the aggressor secreted himself in a dark residential street where the assault could be committed surreptitiously and without interference from witnesses or passers, but that the employee so assaulted and his family who have been left fatherless and husbandless should be made to suffer because of the cunning of the attacker.

As stated by Mr. Justice Cordoza if the assault had taken place on the threshold of the premises of the employment or so adjacent to the premises as to be

considered on the premises there would be no question of the ultimate determination of the case. Certainly it is inhumane and not in accordance with the principles of justice and the general intentment of the compensation laws to permit a condition to exist where the injury complained of arises out of the employment but because it was by virtue of cunning and deceit inflicted away from the actual premises to be said to be not in the course of the employment.

It is therefore respectfully submitted that this case is so squarely within the rules laid down by Mr. Justice Cordoza approved by the Industrial Commission of Virginia that the Deputy Commissioner and the lower Court erred in their finding and that such findings should be reversed.

H. MASON WELCH,
JOHN R. DAILY,
J. HARRY WELCH,
FRANK PALEY.

COAST OF ATLANTIC
DISTRICT OF COLUMBIA
FILED

IN THE *Henry H. Hoage*

Court of Appeals, District of Columbia

APRIL TERM, 1934

No. 6070

ELEANOR M. MORGAN,
Appellant,

vs.

ROBERT J. HOAGE, DEPUTY COMMISSIONER, UNITED
STATES EMPLOYEES COMPENSATION COMMISSION, AND
STANDARD ACCIDENT INSURANCE COMPANY,
(A Corporation)

Appellees.

BRIEF FOR APPELLEE

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IN THE
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APRIL TERM, 1934

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ELEANOR M. MORGAN,
Appellant,

vs.

ROBERT J. HOAGE, DEPUTY COMMISSIONER, UNITED
STATES EMPLOYEES COMPENSATION COMMISSION, AND
STANDARD ACCIDENT INSURANCE COMPANY,
(A Corporation)

Appellees.

BRIEF FOR APPELLEE

This is an appeal from a decree of the Supreme Court of the District of Columbia dismissing a bill in equity filed by Eleanor M. Morgan against Robert J. Hoage, Deputy Commissioner, United States Employees Compensation Commission. The case arises under the provisions of the Longshoremen's and Harbor Workers Compensation Act, approved March 4, 1927 (U. S. C., Title 33, Chapter 18), as made applicable to employment in the District of Columbia by Act of Congress, approved May 17, 1928 (D. C. Code, Title 19, Chapter 2), which will hereinafter be referred to as the "Compensation Act".

James Frederick Morgan was shot by an assailant

in front of his home, 3629 Jocelyn Street, N. W., in the District of Columbia, on September 29, 1932, and died on October 4, 1932, as a result of the gunshot wounds. At the time of the assault, and for sometime prior thereto, Mr. Morgan was Financial Secretary of Columbia Lodge No. 174, International Association of Machinists, which will hereinafter be referred to as the "Lodge". Eleanor M. Morgan, his widow, filed a claim against the Lodge and its insurance carrier, The Standard Accident Insurance Company, for the death benefits provided by the Compensation Act. The Deputy Commissioner ordered a formal hearing on the claim; and at the hearing the respondents denied that the Lodge was subject to the provisions of the Compensation Act, and that Morgan sustained an injury arising out of and occurring in the course of his alleged employment with the Lodge. Testimony was taken, and thereafter the Deputy Commissioner entered a compensation order rejecting the claim of Eleanor M. Morgan upon the ground that the injury did not occur in the course of Morgan's employment with the Lodge. Eleanor M. Morgan then filed her bill in equity seeking a mandatory injunction to compel the Deputy Commissioner to set aside the Compensation Order entered by him and to award compensation to her.

PLEADINGS

The bill for an injunction filed by the plaintiff alleges that she was the widow of James Frederick Morgan; that James Frederick Morgan was an officer of the Lodge and had been so employed by it from 1924 until the time of his death on October 4, 1932; that the Lodge had complied with the provisions of the Compensation Act; that the plaintiff made claim for

the death of her husband on behalf of herself and her minor child; that the Deputy Commissioner held a hearing on the claim, and the bill proceeds to set out an alleged resume of the testimony adduced at the hearing. Then the bill alleges certain conclusions of law to the effect that the Deputy Commissioner erred in not holding that the injury occurred in the course of the employment; and concludes with prayers for an injunction against the defendant to compel him to set aside the compensation order of February 8, 1933, and to award compensation to the plaintiff. Attached to the bill were certain excerpts from the testimony, marked Exhibit "A", and a copy of the compensation order, marked Exhibit "B".

The Standard Accident Insurance Company obtained an order of Court allowing it to intervene in said cause as a party defendant (R. 93). Then the Standard Accident Insurance Company moved to dismiss the plaintiff's suit on the ground that the bill was incomplete and insufficient, in that a complete transcript of the testimony taken before the Deputy Commissioner was not filed with the bill for the Court to review. At or about that time counsel for the plaintiff entered into a stipulation with counsel for the Deputy Commissioner wherein a complete transcript of the proceedings before the Deputy Commissioner was substituted as Exhibit "A" to the bill in place of said excerpts originally filed. When this was done counsel for the Standard Accident Insurance Company withdrew the motion to dismiss above referred to. The transcript of the proceedings before the Deputy Commissioner appears in the printed record at pages 15 to 93.

Thereafter, the defendant Deputy Commissioner and the intervening defendant Standard Accident In-

surance Company filed separate motions to dismiss the plaintiff's bill upon the grounds that: she was not entitled to any relief at law or in equity; the compensation order complained of was in accordance with law; and the transcript of proceedings before the Deputy Commissioner, annexed to the bill, showed that the deceased James Frederick Morgan did not receive an injury "in the course of" his employment.

The motions to dismiss came on for hearing before the Court. After hearing argument, the Court granted the motions to dismiss, and a decree was entered dismissing the plaintiff's bill for an injunction. Then this appeal was taken by the plaintiff.

STATEMENT OF FACTS

James Frederick Morgan was an employee of the government at the United States Navy Yard. He was a member of and Financial Secretary of the "Lodge" (R. 30, 42, 63); and also did work for the International Association of Machinists, which will hereinafter be referred to as the "Grand Lodge" (R. 44, 45, 52, 53, 54, 56). This activity of Mr. Morgan's with the Lodge and Grand Lodge was in addition to his regular employment at the United States Navy Yard (R. 24, 63). The only alleged employment involved in this case is that of Mr. Morgan's work for the "Lodge".

The duties of the Financial Secretary are set out in the By-Laws of the Lodge, which were in evidence (R. 60, 61), and there was other testimony regarding his duties. In brief, his duties were to receive dues collected by the shop stewards, keep a record of each member's payments and then turn the money over to the Treasurer (R. 30, 32, 34). Mr. Morgan's duties were largely of a clerical nature, and he did his work

at the Lodge office, Naval Lodge Building, 4th Street and Pennsylvania Avenue, Southeast (R. 31, 33, 50, 67). He worked every evening of each week, except Saturday and Sunday, from 6:30 or 7:00 o'clock until 11:00 or 12:00 o'clock and on Saturday morning at the Lodge office (R. 67, 76, 81). Mr. Morgan owned and operated his own automobile, and the Lodge did not pay anything for his transportation (R. 39, 51).

On the evening of September 29, 1932, Mr. Morgan went from his work at the Navy Yard to his home, 3629 Jocelyn Street, Northwest, in the usual manner for dinner. Although he passed the vicinity of the Naval Lodge Hall, he took some books and records of the Lodge with him. After finishing his dinner he stayed at his home for a short time. In accordance with his usual custom he was going to his office at the Naval Lodge Hall to do some work for the Lodge; and his wife, Eleanor M. Morgan, had decided to go over to visit his mother, and Mr. Morgan was going to drive her there on his way to the Naval Lodge Hall (R. 68, 72, 73, 74). While in front of his home, Mr. Morgan was shot by an assailant identified by him to be one Harrison Kieser (R. 69, 80, 82). Mrs. Morgan was upstairs in their home when the shots were heard, and she rushed out and found him in the street (R. 68, 75, 81). When the shots were heard Mrs. Morgan thought he was still in the house (R. 68, 74, 81). There is some conflict in the testimony as to whether Mr. Morgan was sitting in his car (R. 89), sitting in the car waiting for his wife (R. 80, 90) or getting into his car (R. 25) when his assailant came up and opened fire on him. In either event he was in front of his home, 3629 Jocelyn Street, Northwest, when he was assaulted; and his place of employment was at the Naval Lodge Hall, 4th Street and Pennsylvania Ave-

nue, Southeast. After the shooting, Mr. Morgan was taken to the Emergency Hospital, where he died, on October 4, 1932, as the result of the gunshot wounds.

It appears that Harrison Kieser, an employee then at the Navy Yard, had applied for reinstatement to the Lodge, and had made a five dollar payment on the ten dollar fee therefor. Shortly thereafter he was furloughed from his job at the Navy Yard, and requested Mr. Morgan to obtain the return of the five dollar payment. Morgan advised him to write to the Lodge; and Kieser, on June 23, 1932, addressed a letter to the Lodge requesting the return of the five dollar payment (R. 47). The Lodge, at a meeting on July 6, 1932, decided not to refund the payment; and on July 15, 1932, a letter was written by Walter B. Hurley, Recording Secretary of the Lodge, advising Kieser that his request for the return of the payment had been denied (R. 48). Morgan felt that the Lodge should have returned the payment and openly expressed that feeling (R. 49, 63). Some reference is made to a discussion between Morgan and Kieser in which Kieser demanded the return of the payment and Morgan told him he could not make the payment except out of his own pocket. One witness testified that Morgan told him, while in the hospital, that Kieser thought he (Morgan) was responsible for his not getting the money returned and held a grudge against him on that account (R. 24, 25). Other witnesses testified that Morgan made statements to the effect that he knew of no personal reason why Kieser shot him (R. 75, 87, 89).

QUESTIONS INVOLVED

The primary questions involved in this case are whether the injury sustained by James Frederick

Morgan occurred "in the course of" his employment with the Lodge within the meaning of the Compensation Act; and whether the findings of fact made by the Deputy Commissioner are supported by substantial evidence and therefore conclusive.

The appellant has assigned certain alleged errors of the Court below in not making certain findings; but since the case was disposed of upon the defendants' motions to dismiss and the Court was not called upon to make any findings, it is apparent that these assignments of error do not raise any real question for this Court to consider. The errors assigned by the appellant (R. 96) are as follows:

1. The Court erred in holding that the death arose "out of and in the course of his (deceased) employment", in accordance with Section 2 (2) of the Act; but finding on the contrary that the injury and death "did not arise in the course of his (deceased) employment".
2. And in not applying in favor of plaintiff the presumptions accorded to her by Section 20, of the Act.
3. In finding that the deceased's only place of employment was at the Lodge Hall.
4. In not finding that the employment was elsewhere other than at the Lodge Hall.
5. In not finding that the injury arose in the course of employment.
6. In failing to make a finding for the plaintiff on the whole case and failing to award plaintiff compensation for herself and minor child.
7. The Court committed other errors of law apparent on the face of the record and also the Court in dismissing the Bill of Complaint herein.

ARGUMENT

At the outset of the argument the appellee wishes to state to the Court that at the hearing before the Deputy Commissioner it was denied that the Lodge was an employer within the meaning of the Compensation Act and that Morgan was an employee of the Lodge. Since the Deputy Commissioner rejected the claim for compensation, it has been unnecessary for the appellee to urge these points further. These questions are not presented on this appeal; and, without further reference thereto, the argument herein will be confined to the issues raised on this appeal.

NATURE AND EXTENT OF REVIEW PROPERLY BEFORE THE COURT.

The Compensation Act, applicable to cases of employment within the District of Columbia, sets up an administrative tribunal for prompt determination of claims filed under the provisions of the Act. It provides that claims shall be filed with the Deputy Commissioner, who, when the right to compensation is controverted, shall hold a hearing and, upon the facts adduced, enter a compensation order containing findings of fact and an award or rejection of compensation based thereon. This procedure was followed in this case.

The Compensation Act provides for a review of the compensation order in Section 21 (b). It is under the authority of this section of the Act that the proceedings herein were instituted in the Court below, and under which this appeal is taken.

Section 21 (b) is as follows:

“Section 21,

(b) If not in accordance with law, a compen-

sation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the Supreme Court of the District of Columbia if the injury occurred in the District) * * *.”

It is to be observed that this section of the Compensation Act is limited by the terms “If not in accordance with law”. This Court, in the case of *Powell vs. Hoage*, 61 App. D. C. 99; 60 W. L. R. 349, in commenting upon this section of the Compensation Act, said:

“We therefore reach the conclusion that the cases in which we may set aside an order of the Commissioner as ‘not in accordance with law’ are only those in which it appears there is an error of law, or in which the order of the Commissioner is not supported by substantial evidence, as well, of course, in those in which it is arbitrary and unreasonable.”

To the same effect are the decisions of the United States Supreme Court. See:

Crowell vs. Benson, 285 U. S. 22; 76 L. Ed. 598;
Voehl vs. Indemnity Insurance Co. etc., 288
 U. S. 165; 77 L. Ed. 676.

With this preliminary statement of the nature and extent of the review properly within the province of this Court, we come to a consideration of the merits of this case.

**IN ORDER TO BE COMPENSABLE, AN INJURY
MUST BOTH "ARISE OUT OF" AND OCCUR
"IN THE COURSE OF" THE EMPLOYMENT.**

The Compensation Act limits the application of the benefits provided thereby to disability or death resulting from an *injury*. The term *injury* as used in the act, is defined in Section 2 (2), as follows:

"Section 2. When used in this Act * * *

(2) The term 'injury' means accidental injury or death arising out of and in the course of employment * * *."

The leading authority for the meaning of the terms "arising out of and in the course of employment" is the case of *In Re McNicol*, 216 Mass. 497, 102 N. E. 697, L. R. A. 1916A, 306, wherein the Court said:

"In order that compensation may be due the injury must *both* arise out of and also be received in the course of the employment. *Neither alone is enough.* * * * It is sufficient to say that an injury is received 'in the course of' the employment when it comes while the *workman is doing the duty which he is employed to perform*. It 'arises out of' the employment, when there is apparent to the rational mind upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury." (Italics ours.)

It is obvious that the terms "arising out of" and "in the course of" are not synonymous. The words "arising out of" refer to the origin or cause of the accident; and the words "in the course of" refer to the time, place and circumstances under which the accident occurred.

See annotation L. R. A. 1916 A, page 232.

The provision of section 2 (2) of the compensation act is in the *conjunctive*, that is, the injury must be one "arising out of *and* in the course of" the employment. The finding of one condition precedent without the other will not sustain an award. Both must appear. See:

Harris vs. Cheney Hammer Corp., 221 App. Div. 199 (N. Y. 1927).

At the hearing before the Deputy Commissioner it was denied that the assault upon Morgan arose out of and occurred in the course of his employment. There was very little evidence to show that the injury arose out of the employment, and that question is one involving considerable doubt. However, the Deputy Commissioner found that the injury arose out of the employment.

The Deputy Commissioner, upon the evidence given at the hearing, found that the assault upon Morgan did not occur in the course of his employment; and, therefore, rejected the claim of the appellant for compensation.

The injury must occur in the course of the employment. See:

DeVoe vs. New York State Railways, 218 N. Y. 318; 113 N. E. 256; L. R. A. 1917 A, 250;

Industrial Comm. of Ohio v. Ahern, 162 N. E. 272; 59 A. L. R. 367;

Spiller vs. Industrial Commission, 331 Ill. 401; 163 N. E. 406; 60 A. L. R. 1397.

In the case of *DeVoe vs. New York State Railways*, *supra*, the Court said:

"At home or on the street he may meet with accident not arising out of or in the course of his

employment. The Act does not cover such cases. The employee gets up in the morning, dresses himself, and goes to work, because of his employment; yet if he meets with an accident before coming to the employer's premises or his place of work, that is not a risk of his occupation, but of life generally."

**THE INJURY DID NOT OCCUR
"IN THE COURSE OF" THE EMPLOYMENT.**

As a general proposition an injury occurs "in the course of" the employment when it comes while the employee is on the premises of the employer or while he is at the place his employment requires him to be, and usually while he is actually engaged in performing some service for his employer.

In the case of *Vochl vs. Indemnity Insurance Company of North America*, 288 U. S. 165; 77 L. Ed. 676, the Supreme Court of the United States recognized and approved the general rule that injuries sustained by employees while going to or returning from their place of employment do not occur in the course of employment. The language used by the Court is as follows:

"The general rule is that injuries sustained by employees when going to or returning from their regular place of work are not deemed to arise out of and in the course of their employment. Ordinarily the hazards they encounter in such journeys are not incident to the employer's business."

See also:

DeVoe v. New York State Railway Company,
218 N. Y. 318; 113 N. E. 256; L. R. A. 1917 A,
250;

Grathwohl v. Nassau Point Club Properties, 216 App. Div. 107; 214 N. Y. Supp. 496; 243 N. Y. 567; 154 N. E. 608;
Podgorski v. Kerwin, 114 Minn. 313; 175 N. W. 694;
Nesbit v. Twin City Forge & Foundry Co., 145 Minn. 286; 177 N. W. 131; 10 A. L. R. 165.

The Supreme Court in the very recent Voehl case, *supra*, recognized and called attention to certain exceptions to the general rule. These exceptions will hereinafter be taken up and considered separately.

First Exception.

An employee may be entitled to compensation for an injury sustained while he is seeking ingress to or egress from his employer's premises, and while he is immediately adjacent thereto, even though he be injured a few minutes before his work is to begin. See: *Cudahy Packing Company v. Parramore*, 263 U. S. 418; 68 L. Ed. 366.

In the later case of *Bountiful Brick Company vs. Giles*, 276 U. S. 154; 72 L. Ed. 507, the Supreme Court reaffirmed this exception to the general rule. In that case the Court said:

“Employment includes not only the actual doing of the work, but a reasonable margin of time and space necessary to be used in passing to and from the place where the work is to be done. If the employee be injured while passing, with the express or implied consent of the employer, to or from his work by a way over the employer's premises, or over those of another *in such proximity and relation as to be in practical effect a part of the employer's premises*, the injury is one arising out of and in the course of the employ-

ment as much as though it had happened while the employee was engaged in his work at the place of its performance."

The appellant in her brief relies strongly upon the case of *Field vs. Charmette Knitting Company*, 245 N. Y. 139; 156 N. E. 642. It is obvious that this case comes within this exception since the employee was assaulted immediately upon walking out of his employer's premises on to the public sidewalk; also there is the further circumstance of an uninterrupted chain of events beginning upon the employer's premises and culminating in the assault just outside of the premises; all within a very brief space of time.

The decision of the New York Court in the *Field* case does not apply to the facts in this case. Here the assault occurred while Morgan was in front of his home, *several miles* from his place of employment, the Naval Lodge Hall. His home and his place of employment are in entirely different sections of the District of Columbia, the distance separating them being almost from one end of the District of Columbia across to the opposite end. Also Morgan was not *leaving* his place of employment at the time of the shooting, but rather was leaving his home for the purpose of *going to* his place of employment in the usual manner to begin his work for the Lodge.

As to the other element in the *Field* case, there is no evidence of any argument or quarrel having occurred between Morgan and his assailant on the day of the shooting, or, as a matter of fact, at any other time. No continuous and uninterrupted chain of events is present in this case. The only correspondence with Kieser was had more than two months before the shooting, and that was handled by another officer of

the Lodge. There are no dealings thereafter with Kieser identified either as to time or place.

The facts do not bring the case within this exception.

Second Exception.

Compensation may be allowed an employee for an injury occurring while going to or returning from his place of employment in cases where transportation is furnished by the employer. This exception does not apply in this case because Mr. Morgan owned and operated his own automobile, and the Lodge did not make him any allowance for his transportation.

Third Exception.

There are also instances where compensation is allowed for an injury occurring while the employee is on a special errand for his employer.

This exception has no application in this case since Morgan was not going on any special errand but was leaving his home to go to his place of employment in the usual manner and at the usual time, and no special orders had been given him that day. Nor was he engaged in *any* errand or performing any duty for the Lodge at the time of the assault.

Fourth Exception.

An exception is also made to the general rule in cases of traveling employments, such as solicitors, outside salesmen and others whose work requires them to travel or be on public streets. These types of cases are collected and discussed in annotations appearing in 29 A. L. R. 120, and 36 A. L. R. 475.

The employment of Morgan by the Lodge was not

a traveling employment. He had a regular place of employment, namely, the Lodge office at the Naval Lodge Hall, where he worked every evening, except Saturdays and Sundays, from 6:30 or 7:00 until 11:00 or 12:00, and on Saturday mornings. This exception is, therefore, not applicable to this case.

The foregoing are all of the recognized exceptions to the general rule. None of them fit the facts of this case. On the contrary this case comes squarely within the general rule recognized in the Voehl case, *supra*, namely, that an accident occurring while the employee is going to or returning from his place of employment does not occur "in the course of" the employment. The assault upon Morgan occurred while he was going to his place of employment. It, therefore, did not occur "in the course of" his employment with the Lodge.

THE DEPUTY COMMISSIONER'S FINDINGS OF FACT ARE SUPPORTED BY EVIDENCE, AND ARE, THEREFORE, CONCLUSIVE.

In reviewing the proceedings before the Deputy Commissioner and in determining whether a compensation order is "in accordance with law" the Court is bound by the findings of fact of the Deputy Commissioner, if such findings of fact are supported by any substantial evidence.

Voehl vs. Indemnity Insurance Co. of N. A., supra;
Crowell v. Benson, supra;
Powell v. Hoage, supra;
New Amsterdam Cas. Co. v. Hoage, 61 App. D. C. 306; 62 Fed. (2d) 468;
Lumberman's Mutual Casualty Co. v. Hoage,

61 App. D. C. 171; 60 W. L. R. 491; 58 Fed. (2d) 1072;
Harris, etc. et al, v. Hoage, 61 W. L. R. 615;
Aetna Life Insurance Company v. Hoage, 61 W. L. R. 163;
Hoage v. Employers Liability Assurance Corp., 61 W. L. R. 370;
Hoage v. Murch Brothers Construction Co., 60 App. D. C. 218; 59 W. L. R. 552;
Wilson & Company v. Locke, 50 Fed. (2nd) 81;
Wheeling etc. Company v. McManigal, 41 Fed. (2nd) 593.

The only exception to this rule is the determination of fundamental questions, that is question of relationship of master and servant and the question of the jurisdiction of the Deputy Commissioner. In the case of *Crowell v. Benson*, *supra*, the Supreme Court held as to these questions there was a right to a trial *de novo* in the Federal district court. No such fundamental question is involved on this appeal.

It therefore follows in this case that if the findings of fact of the Deputy Commissioner are supported by substantial evidence they are conclusive; and under the rule universally adopted by this court and others, a mere conflict in the testimony or a preponderating weight of evidence will not justify disturbing such findings. This Court in the case of *Powell v. Hoage*, *supra*, on this point, said:

“While, therefore, we might have reached a different conclusion on the evidence, we feel that we may not, under the rule we have announced, substitute our judgment for that of the commissioner, and, since we may not, it follows that we must affirm the action and decision of the Court below.”

The findings of fact of the Deputy Commissioner appear in the record, pages 9, 10, 11, 12 and 13. Pertinent parts of the findings of fact, which seem to be involved in this case, are as follows:

“That on said day the employee above named was financial secretary of Columbia Lodge No. 174, I.A. of M., whose offices are located at Fourth Street & Pennsylvania Avenue, S.E., and he also was an employee of the Navy Yard, Washington, D. C.; that it was the custom of said employee to work at the Lodge Hall, located at Fourth Street & Pennsylvania Avenue, S.E., every evening excepting Saturdays and Sundays from about 7:00 P.M. to approximately 11:00 or 12:00 P.M., and also to work at said Lodge Hall on Saturday mornings; that on September 29, 1932, the date above referred to, Mr. Morgan, employee herein, had left his employment at the Navy Yard, and proceeded to his home at 3629 Jocelyn Street, N.W., Washington, D. C.; that the employee had in his possession some money which he had collected from members of the Lodge and he also had some books in his possession that belonged to the Lodge, which, as a matter of convenience, he was taking to his home, with the intention of bringing them back to the Lodge Hall when he returned to perform his evening service; that after having his dinner at an hour between 6:30 and 7:00 P.M., the employee informed his family of his intention of going to the Lodge Hall; that the employee left the house, walked out on the sidewalk to the street, and as he was about to enter his automobile for the purpose of driving to the Lodge Hall, he was shot by a man, whom the employee said was a Mr. Kieser; * * * The place of employment was the Lodge Hall at Fourth Street and Pennsylvania Avenue, S.E., and it was the regular custom of the employee to go to do his regular work as financial secretary at this hall.

The general rule of compensation law is that injuries occur in the course of employment when the injured employee is on, entering or leaving the premises of the employer through exits of the building provided by the employer; however, there are exceptions to this general rule which include the performance of special errands; where the employee is paid from the time he leaves his home until he returns thereto; where the employer furnishes the means of transportation; where the employee has some unusual service to perform after usual working hours; where the employee is a traveling salesman, and other similar situations; that there is no evidence to show that any of the exceptions above named apply in this case, but that the employee was proceeding in the customary manner at the customary hour to his usual place of employment."

The following references to the testimony given at the hearing before the Deputy Commissioner are made in order to demonstrate that these findings of fact are amply supported by substantial evidence.

On page 25 of the record the following testimony appears:

"He left his home after dinner, started down the steps, walked over to the curb and was about to get into the automobile when he was shot."

On page 67 of the record the following testimony appears:

"Well, every evening, since as far back as I remember, since Mr. Morgan has been financial secretary, he would come home in the afternoon to dinner and as quick as he could he would dress, eat his dinner, look over the paper for a few moments and go back again to the offices in the Lodge Room in the Naval Lodge Building, and he used to endeavor to leave about 6:30."

On page 68 of the record the following testimony appears:

“Well, he sat down to look over the paper a little while, and while he was sitting there I went upstairs and it was just about time for him to leave; he was waiting to see if my daughter who had not come home for dinner had come in; he always waited to see her a few minutes; that evening I said that if my daughter Alice did not come home I would ride over as far as the office with him because I wanted to see his mother who lived about a block from the office.”

Further on page 68 of the record the following appears:

“So I went upstairs to finish getting on my hat and coat. I knew it was getting late and he was anxious to leave. I had just gone upstairs and it seemed to me I had not been up there a minute when my daughter came in * * * I was going to say when we heard shots and we stopped talking and looked at one another a minute and stepped to the window * * * I did not realize it was Mr. Morgan; I had left him sitting in a chair.”

On page 80 of the record the following testimony will be found:

“I went into the room and the doctor was working on him, and I asked him what happened, and he said he was sitting in front of his home in his machine waiting for his wife and daughter to come out, and he said he noticed a man approach from the rear of his machine, started to get out and turned around and recognized the man, and the man opened fire on him, and I asked him if he knew the man personally and he said ‘yes’.”

Then on page 90 of the record the following testimony appears:

“He said that he was parked there in his car, sitting in his car, waiting for his wife and daughter, and he was going over to Southeast, to Fourth and the Avenue, the Naval Lodge Hall.”

This evidence, together with other evidence in the case, clearly demonstrates that Mr. Morgan was either sitting in his automobile or getting into his automobile, in front of his home at the time his assailant came up and shot him. The evidence further shows that he intended to and was preparing to go to his place of employment at the Naval Lodge Hall at the usual time and in the usual manner. It has previously been demonstrated herein that the Lodge did not pay for his transportation, and it is obvious that he was not in the performance of any special service or errand for the Lodge. In fact he was not doing anything for the Lodge at the time of the assault. He was several miles away from his place of employment, so that, instead of there being a disputed question as to whether the injury occurred “in the course of” the employment, all of the evidence bearing on that point shows that the injury did not occur “in the course of” the employment. The findings made by the Deputy Commissioner, therefore, are the only findings he could have properly made upon the evidence.

Upon the authority of the above cited cases, and it appearing that the findings are amply supported by substantial evidence, it follows that the findings of fact of the Deputy Commissioner in this case are conclusive.

SECTION 20 (a) OF THE COMPENSATION ACT IS NOT A SUBSTITUTE FOR PROOF.

The appellant in her brief calls attention to Section 20 (a) of the Compensation Act, which provides as follows:

“Section 20—In any proceedings for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary—

(a) that the claim comes within the provisions of this Act.”

This Section of the Compensation law is not a substitute for facts or a substitute for proof.

Eldridge v. Endicott, 228 N. Y. 21;
Collins v. Brookland Union Gas Company, 171 App. Div. 381 (N. Y.).

The burden is on the claimant to prove by substantial evidence that the injury arose out of and in the course of the employment.

Westman's case, 118 Me. 133; 106 Atl. 532.

This Court in the case of *Indemnity Insurance Company of North America vs. Hoage*, 61 App. D. C. 173; 60 W. L. R. 450, passed upon this Section of the Compensation Act. While the judgment of this court was reversed by the Supreme Court of the United States, the reversal was upon another ground, and the holding of this court on the effect of Section 20 (a) of the Act was not disturbed. In that case, this Court said:

“This statutory presumption, however, furnishes merely a basis for proof and not a substitute therefor. It does not shift the burden of

proof from the claimant to prove by substantial evidence that the injury arose out of and in the course of his employment.”

It is therefore submitted that the claimant before the Deputy Commissioner always has the burden of proving that the injury arose out of and occurred in the course of the employment. It would be beyond the power of the Deputy Commissioner to make an award for compensation without evidence to support his findings of fact and award. See:

New Amsterdam Cas. Co. vs. Hoage, 60 App. D. C. 45, 46 Fed. (2d) 837;
Liberty Mutual Insurance Co. vs. Hoage, 61 W. L. R. 565;
Wheeling etc. Co. vs. McManigal, *supra*.

CONCLUSION.

The Court below dismissed plaintiff's suit and thereby held that the compensation order of the Deputy Commissioner was in accordance with law. It has been amply demonstrated that Mr. Morgan did not sustain an injury in the course of his employment; and the authorities cited show that the facts in this case bring it well within the general rule that an employee going to or returning from his place of employment is not entitled to receive compensation for an injury received during that time. The order of the Deputy Commissioner fairly and fully reflects the facts demonstrated by the evidence given at the hearing before him. The order is amply supported by substantial evidence and is therefore conclusive. The compensation order is therefore “in accordance with law”, and the lower court properly dismissed plaintiff's bill for

a mandatory injunction to set aside the compensation order. The decree of the lower court should be affirmed.

Respectfully submitted,

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